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Supreme Court of the United States

OCTOBER TERM, 1944 No. 953

IN THE MATTER

OF

CHILDS COMPANY,
Debtor.

IN PROCEEDINGS FOR REORGANIZATION UNDER CHAPTER X OF THE BANKRUPTCY ACT.

No. 82,868.

JOHN F. X. FINN, as Trustee of Childs Company,
Petitioner,

v.

BURTON C. MEIGHAN, JR., as Substituted Trustee under the Last Will and Testament of WILLIAM T. WOOD, Deceased,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I. Opinions Below

The opinion of the Circuit Court of Appeals (per Swan, C.J.) appears in the Record at pages 63-65 and

has not as yet been officially reported. The opinion of the District Court is found in the Record at pages 51-55 and has not as yet been officially reported.

II. Statement of Case

The respondent makes no objection to the statement of the case in the petition.

The sole issue before the Circuit Court of Appeals for the Second Circuit concerned the correctness of the District Court in construing the clause, "if the tenant shall be adjudged bankrupt or insolvent by any court" to apply to the order of the bankruptcy court approving the petition of Childs Company in reorganization and appointing a trustee.

This case does not present any question falling within the category of those defined in Rule 38 of this court as appropriate for certiorari.

The conflict, alleged by petitioner to exist between the Second Circuit and the Sixth Circuit, is illusory and nonexistent.

Everyone of the specifications of error (Brief of Petitioner, p. 6) states an erroneous interpretation of the lease relating to cancellation.

A decision by this court would be of no value as a precedent except in cases involving leases with precisely the same covenants and the same facts.

III. Argument

(A) The decision of the Circuit Court of Appeals for the Sixth Circuit reported in 110 Fed. (2nd) 850 is not in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the instant matter (not as yet officially reported) set forth in Record at pages 63, 65.

To support a real or true conflict between circuits there must exist comparability of issues. That situation does not exist here.

The sole issue of law involved in this matter (forfeiture of lease) is not the same as that which was before the Sixth Circuit in the *Simmons* case. In that case the issue was the right to maintain an equity suit for damages and profits by reason of an alleged patent infringement. *No forfeiture of a lease or other contract was involved.*

The license agreement, after declaring National Tool Company to be the sole owner of six grinding machines, built at its own expense, with the right to use said machines in its factory at Cleveland, Ohio, states, "but the National Tool Company shall not have the right to sell or dispose of said machines directly or indirectly to any person or persons whatever, and in the event of the bankruptcy, insolvency or dissolution of the National Tool Company no title to said machines *shall be vested in any receiver or trustee for purposes of using them in gear grinding shaper cutters*." (Italics supplied.)

There was nothing in the license to prevent the National Tool Company, the licensee, from using the machines even while involved in bankruptcy, insolvency or dissolution proceedings, or after its emergence from

any such proceedings. The license agreement did not provide for forfeiture—*it simply prohibited the sale of the machines to another or the passage of title from the licensee to any trustee or receiver.*

In the instant case the court below had before it a long-term lease containing a definite and unequivocal forfeiture clause for the purpose of determining the scope of the said forfeiture clause.

The license agreement in the *Simmons* case and the forfeiture clause in the instant matter are not at all comparable, and a decision involving the intent of the parties in one is of no pertinency to the intent of the parties in the other.

Petitioner is manifestly in error in attempting to support his contention of conflict by inferring that the Circuit Court in the *Simmons* case passed upon a *forfeiture* issue or that the appeal from the District Court decision involved that issue. Counsel for Simmons, in the course of argument before the District Court, stated: "Nowhere in the bill of complaint was it alleged that the old National Tool Company *had forfeited its rights under the license agreement in question.*" (Italics supplied.) The District Court (opinion not officially reported) stated: "No forfeiture is prayed for. * * *"

The record in the *Simmons* case further indicates that Simmons and her counsel did not petition the bankruptcy court, pending reorganization proceedings, to declare a forfeiture of the license agreement, nor did they file any objections or take any exceptions to the reorganization proceedings. It should also be noted that the decree of confirmation provided, "that the status of the executory contracts of the debtor described in these proceedings and the rights, privileges and liabilities of the

parties herein with respect thereto, as now existing, *shall not be altered, impaired or affected by these proceedings*". (Italics supplied.)

The basis for the Simmons decision was estoppel. As the District Court so aptly put it:

> "The question of the debtor's right to continue under the contract should have been fought out before the master recommended, and the bankruptcy judge approved and confirmed, the plan of reorganization which continued the contract in force and unaffected by reorganization. • • •
>
> "Plaintiff took no action whatever in the 77-B proceedings of the debtor and took no exceptions and made no objections to the findings and report of the Special Master, or to the entering of the decree of confirmation."

An examination of the Simmons record indicates that any other decision by the District Court or by the Circuit Court of Appeals *would have permitted Simmons to attack collaterally the concluded bankruptcy proceedings.*

The Second Circuit decisions (*In re Walker*, 93 Fed. (2nd) 281; *In re Wil-low Cafeterias*, 22 Fed. (Supp.) 617, rev'd on another ground 95 Fed. (2nd) 306, cert. den. 304 U. S. 567) referred to by Simmons in her appeal brief were not considered by the Sixth Circuit since they were not pertinent to the issue in that case. The opinion of the Sixth Circuit does not discuss or even mention these cases.

Petitioner has assumed a conflict, when, in fact, none exists, by fragmentary references to the Simmons brief and record.

(B) The filing, and the approval by the District Court, of the petition by Childs Company for reorganization under Chapter X of the Bankruptcy Act terminated the lease pursuant to and by virtue of the forfeiture provisions contained in said lease.

The approval of the petition by the debtor by the District Court below constituted an adjudication of insolvency in that the said debtor was unable to pay its debts as they matured. *In re Walker*, 93 Fed. (2nd) 281, U.S.C.A. §§530, 541 (Title 11).

It should be noted that this lease is a New York contract made in 1922. New York definitions of insolvency prevailing in 1922 do serve to demonstrate the interpretations and meanings of the word insolvency existing at the time the said lease was drawn. For example, the term insolvency used in the Stock Corporation Law (Section 15) has always connoted inability to meet obligations as they mature (*French* v. *Andrews*, 81 Hun 272, aff'd 145 N. Y. 441). Again, the provision in the General Corporation Law providing for dissolution where the corporation has remained insolvent for at least one year (Section 71) contemplates a failure to pay debts as they mature (*Denike* v. *New York Lime and Cement Company*, 80 N. Y. 599). A further example appears in the definition of the word insolvency in Section 156, Subdivision 3, of the Personal Property Law. Furthermore, in the absence of statute, the term has come to mean inability to meet obligations as they mature (*Sterrett* v. *Third National Bank*, 46 Hun 22, aff'd 122 N. Y. 659; *Hood* v. *Guaranty Trust Co.*, 270 N. Y. 17, 24).

Petitioner argued below that the definition of insolvency in New York Debtor-Creditor Law, enacted in

1925, should be read into the lease. This contention was rejected by the court below. The decision below is not contrary to any New York decision. *Kane* v. *Larkin*, cited by petitioner, involved an attempt to set aside a preferential transfer and not the construction of a lease or other contract. The Debtor-Creditor Law is limited to cases involving conveyances in fraud of creditors and does not represent a general New York definition of insolvency (*Wilcox* v. *Goess*, 16 Fed. (Supp.) 350).

This court has said in *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 74, that:

> "When not instructed by some decision of a state court, we are disposed * * * to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed, as in this instance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws."

Reliance upon New York statutes is not necessary, however, the court below having expressed itself on similar lease clauses drawn about the time of the instant lease in holding the word "insolvency" to mean an inability to meet obligations as they mature and not insolvency in the bankruptcy sense (*In re Willow Cafeterias*, 95 Fed. (2nd) 306, cert. den. 304 U. S. 567; *In re Walker*, 93 Fed. (2nd) 281).

The contention of petitioner (Petitioner's Brief, 1st paragraph, p. 13) that "insolvent" as used in the forfeiture clause of the lease refers to insolvency in the bankruptcy sense was rejected by the court below. As stated by Judge Swan (Record, p. 65):

> "But such a construction would deprive the words 'or insolvent by any court' of all utility; they would add nothing to the preceding words 'adjudged bankrupt'. * * * Since the time-honored meaning of insolvency, in the absence of a statute specifying another meaning, is inability to meet obligations as they mature in ordinary course of business, it is entirely reasonable to suppose that the parties used 'insolvent' in that sense rather than in the limited sense already covered by 'adjudged bankrupt'."

Petitioner argues under Point II (Brief of Petitioner, pp. 9-10) that the decision of the court below tends to defeat the very purpose of reorganization proceedings, and that the question is novel.

This very argument was made by counsel for the debtor in the *Wil-low Cafeterias* case when petitioning this court for a writ of certiorari. The petition in that case was denied (*In re Wil-low Cafeterias*, 304 U. S. 567, case #967, October term, 1937).

The question presented by petitioner is not novel and requires no decision by this court. The question is not what constitutes insolvency as that word is used in the Bankruptcy Act or in state statutes but as to the sense in which the word insolvent was used in this particular contract. As stated by Judge Patterson in the *Wil-low Cafeterias* case:

> "It is idle to discuss the policy behind the enactment of Section 77-B, the question being not what the word 'insolvent' meant to Congress in passing the act but what it meant to the lessor and the lessee when they wrote it into these leases."

Such question is not one deserving the attention of this court.

IV. Conclusion

Involving as it does only the interpretation of a lease, consideration of state laws and the special facts of this case, and without any substantial reason to believe that error has occurred or that injustice has been done, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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